No. 89-1952

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

ARTHUR JONES

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.

Respondent,

Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Eleventh Circuit

SINCLAIR, LOUIS, SIEGEL, HEATH,*
NUSSBAUM & ZAVERTNIK, P.A.
1125. Alfred I. duPont Bldg.
Miami, FL 33131
(305) 374-0544

JAMES F. DOUGHERTY, II, ESQ.
1301 Dade Boulevard
Miami Beach, FL 33139
(305) 531-7300

DWIGHT SULLIVAN, ESQ.
3110 S.E. Financial Center
Miami, FL 33131-2388

EVAN J. LANGBEIN, ESQ.
1125. Alfred I. duPont Bldg.
Miami, FL 33131
(305) 374-0544

*Counsel of Record

QUESTIONS PRESENTED

1. Are false statements in a television broadcast accusing Petitioner of hypocrisy, lying, unscrupulousness and cruelty to animals actionable defamation or merely non-actionable "privileged opinion"?

THE PARTIES

Petitioner is Arthur Jones, inventor of Nautilus exercise equipment. Jones maintains an estate in Central Florida, near Ocala, known as Jumbolair. Respondent is the American Broadcasting Companies, Inc. (ABC), one of the nation's three leading broadcasting companies.

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED	1
THE PARTIES.....	2
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES.....	4
DECISIONS BELOW.....	8
JURISDICTION.....	9
CONSTITUTIONAL PROVISIONS.....	10
STATEMENT OF THE CASE.....	11
A. The Facts	11
B. The Proceedings.....	14
ARGUMENT IN SUPPORT OF GRANTING.... THE WRIT OF CERTIORARI	16
THE DISTRICT COURT AND ELEVENTH CIRCUIT ERRONEOUSLY DETERMINED ABC WAS SHIELDED FROM PETITIONER'S CLAIM OF DEFAMATION BY CATEGORIZING THE STATEMENTS IN "SAVE THE ELEPHANTS" AS OPINIONS" INSTEAD OF "FACTS."	
CONCLUSION.....	46
CERTIFICATE OF SERVICE.....	47

TABLE OF AUTHORITIES

Cases	Page No.
Afro-American Pub. Co. v. Jaffe, 125 U.S. App. D.C. 70, 366 F.2d 649 (1966)	26
Albert Miller Co. v. Corte, 107 F.2d 432 (5th Cir. 1939)	24
Beech Aircraft Corp. v. Rainey, ___ U.S. ___ 109 S.Ct. 439 (1988)	17
Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967)	22
Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976)	21
Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351 (Colo. 1983)	22
Carter v. Sterling Finance Co., 132 So.2d 430 (Fla. 1st DCA 1961)	27
Caswell v. Manhattan Fire & Marine Ins. Co., 399 F.2d 417 (5th Cir. 1968)	27
Cianci v. New Times Pub. Co., 639 F.2d 54, 64 (2nd Cir. 1980)	17,26
Diplomat Electronic, Inc. v. Westinghouse Electric Supply Co., 379 F.2d 377 (5th Cir. 1967)	24,27

Galvan v. Press,
347 U.S. 522 (1954)..... 23

Gertz v. Robert Welch, Inc.
418 U.S. 323 (1974)..... 19

Harte-Hanks Communications,
Inc. v. Connaughton,
__ U.S. __, 109 S.Ct. 2678 (1989). 25,26,30

Hotchner v. Castillo - Puche,
551 F.2d 910 (6th Cir. 1977)..... 21

Information Control Corp. v.
Genesis One Computer Corp.,
611 F.2d 781 (9th Cir. 1980)..... 19

Jones v. ABC,
694 F.Supp. 1542 (M.D.Fla. 1988).. 8

Jones v. Greeley,
25 Fla. 629, 6 So. 448 (1889)..... 27

Lasky v. ABC,
631 F.Supp. 962 (SDNY 1986)..... 16

Loeb v. Geronemus,
66 So.2d 241 (Fla. 1953)..... 27

McBride v. Merrell Dow and
Pharmaceuticals, Inc.,
717 F.2d 1460 (D.C. Cir. 1983).... 23,28

McCabe v. Rottiner,
814 F.2d 839 (1st Cir. 1987)..... 21

McClellan v. L'Engle,
74 Fla. 581, 77 So. 270 (1917).... 27

McNamus v. Doubleday,
513 F.Supp. 1383 (S.D.N.Y.1981)... 22

Milkovich vs. The Lorain Journal Co., et al., ___ U.S. ___, 107 L.Ed.2d 947 (Jan. 22, 1990)..... 11,17,18, 20,44

Milkovich v. The Lorain Journal Co., 46 Ohio App.3d 20, 545 N. Ed.2d 1320 (1989)..... 11

Neary v. Regents of the University of California, 185 Cal.App. 3d 1136, 230 Cal. Rptr. 281 (1986)..... 28

New York Times v. Sullivan, 376 U.S. 254 (1964)..... 24

Ollman v. Evans, 471 U.S. 1127 (1985)..... 18,20

Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984)..... 19

Paul v. Davis, 424 U.S. 693 (1976)..... 23

Quartana v. Utterback, 787 F.2d 1297 (8th Cir. 1986)..... 26

Richard v. Gray, 62 So.2d 597 (Fla. 1953)..... 27

Rosenblatt v. Baer, 383 U.S. 75 (1966)..... 25

Scott v. News Herald, 496 N.E.2d 699 (Ohio Sup. Ct. 1986)..... 18,21,44

Walsh v. Miami Herald Pub. Co., 80 So.2d 669 (Fla. 1955)..... 27

Washington Post Co. v.
Chaloner,
250 U.S. 290 (1919)..... 22

Zartman v. Leheigh County
Humane Society,
482 A.2d 266 (Pa.Supp.Ct.
1984)..... 28

Other Authorities

Hustler Magazine v. Falwell,
103 Harv. L. Rev. 601
(Jan. 1990)..... 19

Newsweek Magazine, "The Battle
Over Animal Rights" (Dec. 26,
1989), p. 50-57..... 28

Restatement (Second) of Torts
§559 (1977)..... 28

Traynor, "Defamation Law: Shock
Absorbers For Its Ride Into
The Grove Of An Academe," 16
Journal of College & University
Law, 373, footnotes 1 & 2
(Winter 1990)..... 28

U.S. Constitution, Amendment I
and Amendment V..... 10

28 U.S.C. §1254(1)..... 9

28 U.S.C. §1332..... 14

DECISIONS BELOW

(A) The District Court's decision in Jones v. American Broadcasting Companies, Inc., is officially reported at 694 F.Supp. 1542 (M.D.Fla. 1988). On Appeal, the Eleventh Circuit affirmed the District Court by a per curiam decision, without rendering an opinion, on December 21, 1989. Rehearing was denied on February 27, 1990, and the mandate issued on March 7, 1990.

JURISDICTION

Jurisdiction to consider this petition is conferred on the Court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the deprivation of a libeled plaintiff's constitutional protection contained within the Fifth Amendment to the U.S. Constitution:

> No person shall ... be deprived of life, liberty, or property without due process of law-,...

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law ... abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

A. The Facts

This Court recently granted certiorari to review Milkovich vs. The Lorain Journal Co. et al, __ U.S. __, 107 L.Ed.2d 947 (Jan. 22, 1990); see also, Milkovich v. Lorain Journal Co., 46 Ohio Supp. 3d 20, 545 N.E.2d 1320 (1989). Like Milkovich, this case features the crucial, recurring issue a defamation plaintiff encounters when he sues a media defendant: are the defamatory statements non-actionable because they may be categorized as "opinion," rather than "fact"?[1]

In 1984, ABC broadcast "The Flying Elephants" idealizing Petitioner, ARTHUR JONES (Jones).

---

[1]Petitioner is indebted to Petitioner in Milkovich for providing copies of both their petition for writ of certiorari and brief filed with this Court. Because of the similarity of the legal issues presented, Petitioner herein adopts much of the legal argument made in the Milkovich case which has been argued in this Court.

Jones maintains an estate in Central Florida, near Ocala, known as Jumbolair. In 1984, ABC reported Jones' daring flight to Zimbabwe, Africa to rescue 63 baby elephants, endangered by a Zimbabwe culling program. The elephants were herded aboard Jones' 707 jetliner and airlifted to safety at Jumbolair in Ocala. Petitioner was portrayed as the noble savior of an endangered species, the African elephant.

On March 12, 1987, Respondent, ABC, broadcast a sequel on its weekly "20/20" newsmagazine dubbed "Save the Elephants."

The 1987 sequel was a dramatic turnabout by ABC. Jones was captioned as an "Entrepreneur" who duped ABC and the American public. ABC branded Petitioner an "eccentric Florida millionaire," accusing him of falsity, dishonesty and hypocrisy in his statements, actions and motives in 1984. The network charged Jones with "dumping" the

elephants, dispersing the herd "to a fate worse than death" by selling them to animal trainers using "cruel" techniques, knowing the animals would be abused, neglected and likely would die.[2]

The ABC depiction of Jones employed the caustic moderation of Hugh Downs, Barbara Walters and ABC's "nature and wildlife correspondent," Roger Caras. The feature used edited clips of the 1984 broadcast, and clips of lengthy interviews with Jones and others. ABC employed an "expert," one Pat Derby, Caras' longtime personal friend, who in fact was not an elephant expert. Ms. Derby made disparaging and derogatory "expert" comments regarding Jones' mistreatment of the elephants. Derby's long friendship with Caras was undisclosed to the viewing public (Derby Dep. 77,169).

---

[2]The complete official ABC transcript is included in the Appendix, A ____.

ABC also did not inform its viewers that Caras coached his friend Derby to deliver a more "life-and-death" indictment of Petitioner. Caras told Derby in ABC's "outtakes": "Somewhere in this, because some bad things have been done -- somewhere in here there's a villain... Someone is doing something terrible to elephants, which was not the advertised intent when they were brought here..." (ABC's Appendix to Motion for Summary Judgment, Ex. F, p.254-255).

B. The Proceedings

Jones sued ABC, alleging the 20/20 broadcast falsely cast him as a liar and a hypocrite, and accused him of animal cruelty. Jurisdiction of the U.S. District Court was based on 28 U.S.C. §1332 (Diversity of Citizenship). Following depositions of Jones and Derby and production of ABC's "outtakes" and other documents, the District Court granted ABC's Motion for Summary

Judgment. In a lengthy opinion (694 F.Supp. 1542), the Court found that selected statements from the "Save the Elephants" broadcast either were not defamatory as a matter of law, or as to those statements which were capable of defamatory connotation, were protected as "opinion" of ABC. The District Court said (694 F.Supp. 1552):

> This constitutes the statements in the broadcast which refers to Plaintiff's keeping a promise or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable. However, the Court finds that these statements are non-actionable opinion.

Petitioner urged the Court to be mindful that "it is the medium which is the message." Jones requested the Court to view the entire broadcast, to consider facial expressions of the speakers in the broadcast and their vocal intonations, to evaluate the film clips and editing, as well as the broadcast "outtakes," to determine the

"overall impact" of the ABC 20/20 broadcast.[3] On appeal, the Eleventh Circuit affirmed the District Court without rendering a written opinion.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

THE DISTRICT COURT AND ELEVENTH CIRCUIT ERRONEOUSLY DETERMINED ABC WAS SHIELDED FROM PETITIONER'S CLAIM OF DEFAMATION BY CATEGORIZING THE STATEMENTS IN "SAVE THE ELEPHANTS" AS "OPINIONS" INSTEAD OF "FACTS."

In granting a summary judgment, the trial judge found:

> ...[T]he statements in the broadcast which refers to Plaintiff's [Jones'] keeping a promise or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable.

---

[3]Courts recognize that "the television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from merely reading of the transcript." Lasky v. ABC, 631 F.Supp. 962, 970 (S.D.N.Y. 1986). ABC contrasted visual clips of African elephants blissfully roaming in their natural habitat, against a backdrop of a snow-capped mountain range (of what might have been Mt. Kilimanjaro in Tanganyka, not Zimbabwe) with later shots of chained elephants, helplessly thrashing about after Petitioner allegedly "dumped" them into captivity.

> However, the Court finds that these statements are non-actionable opinion. (694 F.Supp. 1552)

As in Milkovich, under scrutiny by this Court, this case presents the repeat question almost reflexively raised by media defendants sued for libel. No matter how false or damaging the innuendo, insinuation or "sting" of the defamation, if the defendant can persuade the court that its assertions are "opinions," not "facts," the issue of defamatory meaning may be removed from a jury's consideration. Because statements of "opinion" and "fact" invite "inevitably arbitrary" distinctions and turn on questions of "degree" [see Beech Aircraft Corp. v. Rainey, ____ U.S. ____, 109 S.Ct. 439 (1988)], a libeled plaintiff's right to vindicate his damaged reputation often turns on "Humpty Dumpty's use of language." Cianci v. New Times Pub. Co., 639 F.2d 54, 64 (2nd Cir. 1980). Note, e.g., the trial

court's revealing subjective statements: "If these statements are factual etc. p. 7 infra. Query: Shouldn't Jones have been given an opportunity to prove that the obvious accusations in the broadcast were false.

Chief Justice Rehnquist observed "Lower courts have seized on the word 'opinion' to solve with a meat axe a very subtle and difficult question,..." Ollman v. Evans, 471 U.S. 1127, 1129 (1985) [dissenting from the denial of certiorari]. The dissenting judge in Milkovich, Justice Brown, noted that the legal test applied to distinguishing assertions of fact from opinion amounted to "no more than a geyser spouting judicial steam, fog and mist." Scott v. News Herald, 496 N.E.2d 699, 723 (Ohio Sup. Ct. 1985).

The confusion surrounding the opinion/-fact dichotomy intensified after this Co-

urt's statement in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974):

> Under the First Amendment there is no such thing as a false idea....

The courts have struggled to adopt and apply varying "tests" or "factors" to determine when an "idea" is separated from "facts" connected with those ideas which are defamatory. See, e.g. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980). The result, too often, is a "meat axe" approach, as it was in Jones' case.

Legal distinction between fact and opinion in libel cases is not new. The distinction "formed the backbone of the fair comment privilege." See, Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell," 103 Harv.

L. Rev. 601, 650 (Jan. 1990). The fair comment privilege "roughly functioned to immunize the publication of honestly held but defamatory opinions about matters of public concern that were fair and communicated without malice." Ibid, at 627.

What has changed drastically since Gertz, however, is the elevation of the distinction to one bearing constitutional immunity. The courts now have created numerous local and varied formulae for differentiating a supposedly protected "opinion" from an unprotected "fact" which damages reputation.

For instance, the factors applied in Milkovich were adopted from Ollman v. Evans, supra: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. Other courts have been less

precise in reaching conclusions that "opinions" are constitutionally protected. See, e.g., Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976); Hotchner v. Castillo - Puche, 551 F.2d 910 (6th Cir. 1977); McCabe v. Rottiner, 814 F.2d 839 (1st Cir. 1987). In this case, no "test" or legal analysis was applied; the lower courts simply took the "meat axe" and stated:

> This constitutes the statements in the broadcast which refers to Plaintiff's [Jones'] keeping a promise or not, and perhaps to his "honesty." If these statements are factual in nature they might be actionable. However, the Court finds that these statements are non-actionable opinion. (694 F.Supp. 1552.)

Such analysis has the potential to make "every statement of fact a statement of opinion in every case and therefore not actionable." Scott v. News Herald, supra, 496 N.E. 2d at 725. The standardless conclusion that language is "opinion," not "fact," also ignores recognition "that an

opinion may have as pernicious and harmful effect as other forms of defamation...." Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351, 1385 (Colo. 1983); McNamus v. Doubleday, 513 F.Supp. 1383 (S.D.N.Y. 1981).

A nebulous constitutional protection afforded "opinion" speech also permits the trial court to employ subjective, perhaps even biased, judicial understanding of a publication, which is unarticulated for purposes of appellate review. In Washington Post Co. v. Chaloner, 250 U.S. 290 (1919), this Court stated that if a statement is susceptible to two meanings, one libelous and another not:

> ...[I]t is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read.

See also, Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967); McBride

v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1465 (D.C. Cir. 1983).

If the court makes an "inevitably arbitrary" conclusion that despite defamatory capability an assertion is one of "opinion" and not "fact," then a plaintiff whose reputation palpably may be hurt by the assertion is denied meaningful due process of law. Traditional notions of due process and fair play have called for the application of a legal standard which can be articulated and understood by persons of common intelligence. See, Galvan v. Press, 347 U.S. 522, 530 (1954).[4]

---

[4]This Court stated in Paul v. Davis, 424 U.S. 693, 701 (1976) that harm to reputation alone in a case brought under 42 USC Section 1983 "apart from some more tangible interests such as employment" was not sufficient to invoke protection of the Due Process Clause. The more tangible interest at stake here is the threshold right of a litigant whose reputation has been tarnished or destroyed by a libeler to gain meaningful access to the court in the face of vague legal standards applied to the definition of an "opinion" versus "fact."

Paradoxically, the law of defamation always has looked to "the average normal and reasonable person of ordinary intelligence, in the community of publication..." to determine if a publication is capable of exerting reputational damage. See, e.g., Albert Miller Co. v. Corte, 107 F.2d 432, 435 (5th Cir. 1939); Diplomat Electronic, Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377, 381-382 (5th Cir. 1967). This faith in the reader or viewer of common intelligence is undermined by the amorphous, turgid protection of "opinions," afforded constitutional dimension by the courts.

While there is a societal interest in "uninhibited, robust and wide-open debate" on issues of public concern [New York Times v. Sullivan, 376 U.S. 254, 270 (1964)], society has an equally important interest in protection of the self-esteem and reputation of its individual human beings. Justice

Stewart stated in his concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 93 (1966):

> . . . The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Individuals should not be left without recourse when false and defamatory statements damage their reputation. Jones should not have had his cause summarily terminated at its preliminary stage by the court's conclusion that a clearly defamatory broadcast, viewed nationwide, was nothing more innocuous than a non-actionable, non-defamatory expression of "opinions."

The more elusive the standards of free speech or press in libel cases, ironically the less protection afforded to free speech. Cf., Harte-Hanks Communications, Inc. v. Connaughton, ____ U.S. ___, 109 S.Ct. 2678

(1989). This Court held in Connaughton that the "purposeful avoidance of the truth" shows actual malice. Quoting Afro-American Pub. Co. v. Jaffe, 125 U.S. App. D.C. 70, 76, 366 F.2d 649, 655 (1966) (en banc), the Court recognized "the defamer may be the more successful when he baits the hook with truth." If purely defamatory statements "bait the hook" with alleged "opinions" the remarks are no less defamatory.

In Cianci v. New Times Pub. Co., supra, the court held an allegation imputing "specific criminal or other wrongful acts" was not insulated from liability because of characterization that the statement was only an "opinion." See, 639 F.2d at 64. Imputations of dishonest, unscrupulous or hypocritical acts or conduct are defamatory. See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, supra; Quartana v. Utterback, 787 F.2d 1297, 1301 (8th Cir. 1986);

Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., supra, 378 F.2d at 381-82; Caswell v. Manhattan Fire & Marine Ins. Co., 399 F.2d 417, 420-421 (5th Cir. 1968). Under Florida law, applicable to this diversity case:

> ...Imputation of hypocrisy or dishonesty is as libelous, when veiled under words which mean that, as if made directly by the words themselves.

See Jones v. Greeley, 25 Fla. 629, 6 So. 448, 449 (1889).

Florida courts are as vigilant to flesh out a libel as the defamer may be to disguise it. See generally, Walsh v. Miami Herald Pub. Co., 80 So.2d 669 (Fla. 1955); Loeb v. Geronemus, 66 So.2d 241 (Fla. 1953); Richard v. Gray, 62 So.2d 597 (Fla. 1953); McClellan v. L'Engle, 74 Fla. 581, 77 So. 270 (1917); Carter v. Sterling Finance Co., 132 So.2d 430 (Fla. 1st DCA 1961).

Courts have recognized imputations of animal cruelty, abuse or neglect are defamatory. See Zartman v. Leheigh County Humane Society, 482 A.2d 266, 270 (Pa.Supp.Ct. 1984); Neary v. Regents of the University of California, 185 Cal.App. 3d 1136, 230 Cal. Rptr. 281 (1986).[5] On remand, Neary, a California rancher, recovered $7 million in his libel suit. The rancher had purchased 848 pregnant heifers and took them to his 20,000 acre ranch. Thereafter, 95 cattle and more than 400 calves died. The state, through its veterinarians, blamed Neary for inadequate care. Neary blamed the state for

---

[5]A defamation plaintiff need not show prejudice in the eyes of all members of the community or his associates attributable to a libel. A substantial and respectable minority who would tend to be prejudicially influenced by a false publication is sufficient. Restatement (Second) of Torts Section 559 (1977); see also Afro-American Publishing Co. v. Jaffee, supra, 366 F.2d at 654, no. 10; McBride v. Merrell Dow and Pharmaceuticals, Inc., supra, 717 F.2d at 1465. There are an estimated 7,000 animal protection groups in the United States with combined membership of 10 million and budgets totalling $50 million. See, Newgweek Magazine, "The Battle Over Animal Rights," December 26, 1988, pages 50-57.

using a chemical spray, toxaphene, on the herd. Neary made statements imputing abuse of the animals to the state and its veterinarians on CBS' newsmagazine "60 Minutes." See, Traynor, "Defamation Law: Shock Absorbers For Its Ride Into The Groves Of An Academe," 16 Journal of College and University Law 373, footnotes 1 and 2 (Winter 1990).

The allegations of animal abuse of heifers made against Neary are no different than ABC's accusations that Jones was disbanding his herd of Zimbabwe elephants "to a fate worse than death." Indeed, the label of "opinion" could have been applied much more readily to the accusations against Neary because state veterinarians rendered "opinions" about Neary's treatment of the animals based on a "fact" investigation. This case and Neary are identical in the sense that "opinion" rested wholly on the

investigation of "facts" which the Plaintiff alleged were false and defamatory.

This Court recently expressed continuing disapproval of "slipshod and sketchy investigatory techniques" which manifest "an intent to avoid the truth." Harte-Hanks Communications, Inc. v. Connaughton, supra, 109 S.Ct. 2698-99. ABC's Caras was deeply involved with his good friend, Derby, in a contrived[6] story lambasting Petitioner, creating more "life and death" answers to slanted questions and a more obvious portrayal of Jones's callous disregard for his elephant herd.

ABC's plain message was that Jones was an avaricious "Entrepreneur" seeking to add to his already sizeable wealth at the ex-

---

[6]There was no urgency to the timing of the 1987 "sequel." Caras had plenty of time to seek out a de facto "expert" and Downs and Walters, sophisticated and renowned media personalities, knew the impact of their inflammable treatment of the "Save the Elephants" would be devastating.

pense of the elephant herd contrary to "the advertised intent when they were brought here" from Zimbabwe. The false imputation was one of fact, not opinion. The holding of the lower courts used "Humpty Dumpty's language" in reaching a contrary conclusion and deprived Petitioner of Due Process of Law.

"Save the Elephants" essentially broadcast the following false assertions of fact concerning Jones in the 1987 "20/20" program:

ABC Falsely Stated That Jones Did Not Keep His Word

> Downs [voice-over] And in 1984, these baby elephants walked into our hearts when 20/20 reported how this Florida millionaire airlifted them to safety. Now the herd must be disbanded, and their future is in doubt. Are we all at fault?
>
> Pat Derby, Elephant Expert: What we do to animals in general is not wonderful; what we do to elephants is horrible.
>
> Downs [voice-over]: Roger Caras asks if the dream has gone sour,

and why it's time again to save the elephants.

Walters: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept.

Downs: ..., but next, they say elephants never forget, but sometimes people, unfortunately, do. Roger Caras reports why it may be time once again to "Save the Elephants." Stay with us. [commercial break]

SAVE THE ELEPHANTS

Downs: It's been almost three years now since 20/20 first reported on this man, eccentric Florida millionaire and inventor of the Nautilus exercise machines, Arthur Jones, and his daring airlift rescue of a herd of baby African elephant marked for death. It was one of the most talked about segments we've done here. But, as ABC News nature and wildlife correspondent Roger Caras tells us, what we thought was the happy ending to this elephant story is actually, according to the experts, the beginning of a sad and painful journey.

Arthur Jones, Entrepreneur: I simply could not live with myself if I idly stood by and watched the African elephant become extinct.

Roger Caras [voice-over]: That's how Florida millionaire Arthur Jones explained his mission in 1984, when 20/20 first reported this story. Jones wanted to rescue baby elephants in Zimbabwe from a cull, or thinning of the herd, like this one. [videoclip of elephants being shot] This was the dramatic scene in 1984, when Jones took one of his three 707s across the Atlantic and into the heart of the African continent. His commitment seemed both emotional and financial. . . .

* * *

Mr. Jones: We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country.

Caras [voice-over]: For two and a half years, the Zimbabwe orphans lived the good life here on Arthur Jones' estate in central Florida. But all of that's coming to an end. The herd is being dispersed. . . .

* * *

Ms. Derby: It's his responsibility. That herd was brought over here as a herd, and it should remain a herd.

* * *

Caras: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's a very rich

man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.

* * *

Walters: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.

ABC Falsely Branded Jones A Liar

Jones told ABC that he had lost legal control of his company and any elephants sold from the herd at Jumbolair had been sold by one Travis Ward during the time Ward controlled Nautilus.[7]

In its 20/20 broadcast, ABC duly recited Jones's statement and then proceeded to

---

[7]Plaintiff was the founder of Nautilus. It started doing business in 1970. Jones developed and invented all of Nautilus's exercise equipment. He sold Nautilus to Ward to devote more time to revolutionary medical machines diagnosing lumbar problems and lower back injuries. Jones was preparing to introduce the products on the market place when ABC broadcast "Save the Elephants."

vouch for statements of Derby and Caras calling Jones a liar:

> Caras [voice-over]: But Ward says that they didn't control anything until August 1986. They never sold any elephants, and the agreements to sell them to a part-time animal dealer named David Meeks was signed by Jones' foreman, Ralph Kramer, in July.
>
> Ms. Derby: Ralph Cramer told me, when I was in Florida in May, that Arthur (Jones) had told him to dispose of as many of the elephants as he could.
>
> Caras [voice-over]: Jones says he doesn't know how many more he will sell.

ABC had the 16 June 1986 contract between Ward and Jones in its possession prior to the broadcast. The agreement to sell elephants to Meeks was signed by Cramer as "Nautilus Representative," not "Jones' foreman." Indeed, ABC flashed the agreement on the video portion of the broadcast at the same instant Caras stated on the audio voice-over that Jones says "he doesn't know

how many more he will sell." The agreement showed it was between Meeks and Nautilus. ABC also did not disclose Jones's intention to maintain a herd of 30 to 50 African elephants.

ABC Falsely Portrayed Jones As A Hypocrite

> Arthur Jones, Entrepreneur: I simply could not live with myself if I idly stood by and watched the African elephant become extinct.
>
> Roger Caras [voice over]: That's how Florida millionaire Arthur Jones explained his mission in 1984, when 20/20 first reported his story.
>
> Roger Caras [voice over]: . . .After a hair-raising 22 hour flight, they arrived at Jones's ranch for, it was assumed, the rest of their lives. At least, that was the impression Jones gave.
>
> * * *
>
> Mr. Jones: We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country.
>
> Mr. Jones: You know, and sometimes I'm not even responsible for the past, Roger, don't try to hold me responsible for the future.

Caras [voice over]: . . . and Arthur Jones, commenting on elephant ownership in general, said the advice of Confucius might apply:

Mr. Jones: "He who chooses to ride the tiger should carefully determine in advance how he intends to dismount."

* * *

Walters: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?

Caras: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's a very rich man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.

* * *

Walters: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.

The fact was, as ABC knew at the time of the 1987 broadcast, that Jones had arranged to endow the elephant herd and have the University of Florida take care of them (Ex F, 138-139, 142). Caras told Derby that Jones had provided for the elephants in his will (Derby Dep. p. 166).

Underscoring ABC's defamatory and false assertions of fact was clear evidence of the network's "actual malice." From producer, Lynn Murray, to moderators Downs and Walters, to "wildlife" reporter, Caras, there was a pre-conditioned and determined intent to "get" Jones. Caras employed his friend, Derby, vouching for her pronouncements, to portray the Petitioner as the story's villain. Derby made the following devastating and derogatory statements about Jones:

Pat Derby, Elephant Expert:[8] What we do to animals in general is not wonderful; what we do to elephants is horrible.

These are extremely social animals. They live for each other, literally, and when you pull a baby elephant out of that situation, that's stressful in itself. I've known of elephants to die just from that.

So many dumped elephants become quote "rogues," because they're mishandled, they're the victims of improper diet, of every kind of atrocity in the world. Their only way to retaliate, they do one of two things, they either attack or they run.

Today, anyone with the money to purchase an elephant can get an elephant. There is no provision for quality of life. There is no provision for expertise. We have no, absolutely no, laws which protect the elephants or the people.

It's his responsibility. That herd was brought over as a herd, and it should remain a herd.

* * *

I really feel they should have been destroyed in Africa.

---

[8]Downs announced "according to the experts" the elephants faced "the beginning of a sad and painful journey." Derby was the only supposed expert.

> It's a quick death. They would have been with their own herd. They would not have known. To send them into anything else is not kind.

Derby was identified as an "Elephant Expert" only on the video portion of "Save the Elephants." Downs referred to her as "experienced elephant handler" on the audio. ABC failed to inform the viewer of Derby's true lack of expertise. Derby and Caras were good friends, calling each other "five or ten times" a year. Derby watched the 1984 program, did not like it, called the National Humane Society and objected (Derby Dep. 151, 152, 165).

Despite her continuing friendship and contacts with Caras, Derby testified that she had "no idea" how 20/20 producer Lynn Murray came to call her in California in 1987 to do an interview concerning the sale of some of the elephants at Jumbolair. ABC paid Derby's airfare to New York and her

hotel bill. After her interview with Caras for the show, Derby spent the weekend with Caras and his wife (Derby Dep., p. 77, 96-97, 123-124, 165-166, 176-178).

Although Derby stated that she knew of instances when elephants died just because they had been split from a herd, ABC did not tell its viewers that sometime prior to the broadcast, Derby arranged a swap with Jones, placing an elephant she had with the herd at Jumbolair in exchange for one of the baby elephants (Derby Dep., p. 102).

Derby admitted she was no elephant expert. She had never been to Africa, never studied elephants in a national habitat, and had never written a book or article about elephants (she had studied English literature at college but did not have a degree) (Dep. 17-19, 65-66).

Derby admitted that her solemn statement on 20/20 about knowing of [separated]

elephants dying from stress was based only upon what third persons allegedly told her, not on first-hand information or observation (Derby Dep., p. 27-34). According to Jones, Derby held herself out "as being totally inexperienced, totally lacking knowledge and seeking knowledge" concerning elephants (Jones Dep. 6/19/87, p. 52). None of this came out in the broadcast, only Derby's condemnation of Jones.

Ominous Letter From The Humane Society

Plaintiff's reputation was immediately harmed by the 20/20 broadcast. He received "hate" calls and letters from persons and organizations concerned about animal cruelty. On 22 April 1987, the Humane Society of the United States wrote him an ominous and threatening letter:

April 22, 1987

Arthur Jones
Jumbolair
P.O. Box 788
Anthony, FL 32617

Dear Mr. Jones:

We are writing to you concerning the recent 20/20 report dealing with the African elephants that are in your care.

The Humane Society of the United States (HSUS) recognizes your original humanitarian gesture of transporting this herd of African elephants to your private land in Florida. This attempt to preserve the lives of these animals was originally reported on the ABC news program 20/20.

However, it was brought to our attention by the March 12, 1987 20/20 report that you have begun to disband this herd by selling the animals to circuses in Mexico or to any other willing person. The HSUS and its members are deeply concerned with the welfare of these animals. We urge you to set up a endowment to guarantee that these beautiful animals can live out their lives on your property. Furthermore, we want to stress the need to begin resolving this problem as soon as possible.

We urge you again to take quick action to rectify this situation and look forward to an early response detailing your plans for the remaining African elephants.

Sincerely yours,

David I. Herbert
Captive Wildlife Specialist

The District Court concluded that ABC's assertion in "Save the Elephants" either were not defamatory or, if defamatory, were expressions of "opinions." Consequently, despite immediate harm to Jones, he was left unable to remedy the damage by "malleable and spongy" legal analysis enabling "any judge or reviewing court to label any clearly libelous statement of fact as a statement of opinion...." Scott v. News Herald, supra, 496 N.E.2d at 723. Like Milkovich presently under review in this Court, this case calls for the redefinition of the legal guidelines for distinguishing fact from the opinion. The economically powerful news media in the United states should not receive absolute immunity from lies and falsehood under the recurrent premise that any deliberate "hatchet job" it perpetrates on

an individual's reputation is constitutionally protected "opinion."

The ABC broadcast of "Save the Elephants," viewed in its entirety, and without any design to overlook its sting or to characterize portions of it as "opinion," not "fact," defamed the Plaintiff. The broadcast imputed dishonesty and hypocrisy. ABC accused Jones of "dumping" the elephant herd to "a fate worse than death." The Plaintiff was accused of exposing the herd to a doomsday future of improper diet, cruelty, mishandling and neglect, in short, to "every kind of atrocity in the world." The overall impact of "Save the Elephants" cannot be diluted by labeling it as an "opinion" of the libeler.

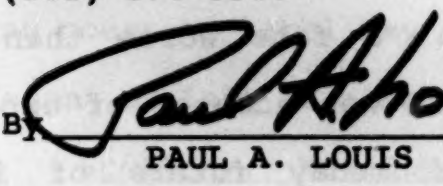
CONCLUSION

For the reasons stated, Petitioner prays that this Court grant this petition and determine that Jones had the legal right

to remedy the harm inflicted by ABC in "Save the Elephants" to Petitioner's good name, self-worth and reputation in this important libel case.

Respectfully submitted,

SINCLAIR, LOUIS, SIEGEL, HEATH, NUSSBAUM & ZAVERTNIK, P.A.
Attorneys of record for Petitioner
1125 Alfred I. duPont Bldg
Miami, FL 33131
(305) 374-0544

By 
PAUL A. LOUIS

JAMES F. DOUGHERTY, II, ESQ.
1301 Dade Boulevard
Miami Beach, FL 33139
(305) 531-7300

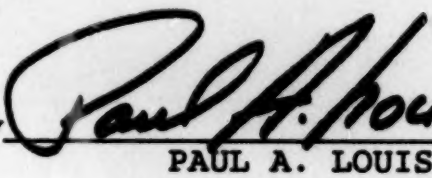
DWIGHT SULLIVAN, ESQ.
3110 S.E. Financial Center
Miami, FL 33131-2388

EVAN J. LANGBEIN, ESQ.
1125 Alfred I. duPont Bldg.
169 East Flagler Street
Miami, Florida 33131
(305) 374-0544

Of Counsel

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to Gregory G. Jones, Esq., Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., One Harbour Plaza, P.O. Box 3239, Tampa, Florida 33601, on this 24th day of May, 1990.

By 
PAUL A. LOUIS